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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1960

No. [redacted] 145

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation, et al.,
Petitioners,

vs.

BANKERS TRUST COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioners pray that a writ of certiorari issue to review the decision of the Court of Appeals entered on 24 August 1960 which reversed the decision of the District Court.

OPINIONS BELOW

The District Court opinion is unreported and is submitted herewith as part of the Transcript of Record (pp 121-128). The Court of Appeals opinion is reported at 282 F2 106 and is included as Appendix A hereof.

JURISDICTION

The opinion and judgment of the Court of Appeals were dated and entered on 24 August 1960 (Appendices A and B). Timely petition for rehearing was denied on 20 March 1961 (Appendix C) and mandate issued on 27 March 1961. This Court's jurisdiction is invoked under 28 USC 1254(1).

STATUTES INVOLVED

No statutes are involved in this petition.

QUESTIONS PRESENTED

1. Is a fire insurance policy a contract, or is it a commodity?

2. Can a party who has enforced by judgment a written fire insurance policy without seeking reformation, thereafter maintain a separate fraud action based on the assertion that the terms of the policy enforced were not the terms to which he agreed?

STATEMENT

Respondent's building was covered by 4 fire insurance policies issued by petitioners in the total face amount of $290,000. Each policy provided for payment of actual cash value of property destroyed, which value in event of dispute was to be fixed by appraisal.

Respondent's building was totally destroyed by fire. Pursuant to the policy terms and to a post-loss agreement

between respondent and petitioners, appraisal proceedings were commenced. Respondent sued petitioners in Nevada court and obtained an order appointing an umpire. The appraisal award fixed the actual cash value of the building, and respondent's loss under the policies, at $175,000. Respondent then reactivated the earlier Nevada action, praying for an order confirming the appraisal award and for judgment on it; a judgment was thereupon entered against petitioners in the amount of the appraisal award ($175,000). Petitioners paid the judgment in full, receiving and filing satisfactions thereof.

Six month later, respondent filed the present action in Nevada state court seeking recovery of an additional $115,000 (the difference between the $175,000 paid by petitioners under the earlier judgment and the $290,000 face amount of the policies), plus other amounts (chiefly interest items) not relevant to this petition. This action was based on the assertion, *then made for the first time*, that the insurance contract which respondent had enforced by judgment was not really the true contract between the parties because petitioners had orally represented that they would pay, in event of total loss, the full face amount of the policies without appraisal.

The second action was removed by petitioners on diversity grounds (28 USC 1441) to the United States District Court for Nevada. The District Court entered summary judgment for petitioners, holding that respondent's prior judgment on the appraisal award barred the present action.

Respondent thereupon appealed to the Court of Appeals.

In its appeal briefs respondent characterized its case as sounding either in contract for breach of warranty or in tort for fraud. On oral argument, respondent for the first time abandoned its contract claim. The Court of Appeals conceded that the action would be barred if based on contract, but held that it was saved by the "fraud" label applied to it. Accordingly, the judgment of the District Court was reversed.

REASONS FOR GRANTING THE WRIT

The decision entails far-reaching and adverse effects on the finality of judgments on written contracts in general and on fire insurance policies in particular. These effects are such that no judgment on a written contract or fire policy can henceforth be regarded as final, since the party enforcing the contract or policy in the first instance is given by the opinion the right to bring a subsequent action labeled "fraud" based on the assertion that the contract or policy which he has used the judicial process to enforce was not a contract but a contrivance. This result is reached by reasoning from a false premise on the nature of fire insurance policies and then deriving "rules" which are presented as applicable to all written contracts.

I. THE OPINION RESTS ON THE PREMISE, DIRECTLY CONTRARY TO THE PRONOUNCEMENTS OF THIS COURT, THAT A FIRE INSURANCE POLICY IS NOT A CONTRACT BUT A COMMODITY.

This Court has consistently taken the position that fire insurance policies are contracts and not commodities having independent intrinsic value:

> "• • • [P]olicies are simply contracts of indemnity against loss by fire, entered into between the corporation and the assured for a consideration paid by the latter. These contracts • • • are not subjects of trade and barter offered in the market as having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded • • • and then put up for sale."
>
> *Paul v Virginia* (1869) 8 Wall (US) 168, 183;
>
> *US v SE Underwriters Assn* (1944) 322 US 533, 543, n 17.

The opinion's erroneous premise is reflected in its description of the case:

> "• • • [A]ppellant commenced an independent action • • • based on alleged fraud in the misrepresentation by appellees to appellant of the *value of the policies.*" Appendix A, p ii. [Emphasis added.]

This error is compounded by the opinion's reliance on cases involving misrepresentation of value of physical property to support the conclusion that respondent could sue on the policies as written and bring a later action for fraud (analogous, per the opinion, to keeping the property received and suing for the difference between its actual value and the value as represented).

At a later point, the opinion recognizes that the alleged misrepresentations did not concern the "value" of the policies but their terms:

> "• • • [T]he policies were represented to be 'valued' policies which would pay the full face amount ($290,000) in case of total destruction, whereas they actually provided for paying only the actual cash

value of the property at the time of loss." Appendix A, p ii.

While the opinion thus observes that the alleged misrepresentations concerned what the policies "actually provided for", the holding is based on analogy to misrepresentation of the value of tangible physical property. This analogy is fundamentally unsound if a fire insurance policy, *as this Court has held*, is properly regarded as a contract rather than a commodity.

II. NOT ONLY IS THE DECISION BASED ON A FALSE PREMISE AS TO THE NATURE OF A FIRE INSURANCE POLICY, BUT THE OPINION FAILS TO SPECIFY ITS PREMISE AND PURPORTS TO MAKE GENERAL LAW IN THE FIELD OF CONTRACTS. IN THIS RESPECT, THE DECISION SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The opinion violates the fundamental policy of the law that a party shall not recover successive judgments based on inconsistent and conflicting facts.

The opinion's emphasis on legal labels has seriously obscured the basis of the doctrine of election of remedies.

> "• • • [T]he so-called 'inconsistency of remedies' is not in reality an inconsistency between the remedies themselves, but must be taken to mean that a certain state of facts relied on as the basis of a certain remedy is inconsistent with, and repugnant to another state of facts relied on as the basis of another remedy."
>
> 18 *Am Jur* 135, Election of Remedies §12.

The question of whether respondent's present action is consistent with its prior suit to enforce the policies as

written cannot be resolved by mechanical application of legal labels such as "fraud", "reformation" or "contract". The use of these labels merely begs the question of whether the *facts* now asserted by respondent are consistent with the *facts necessarily asserted* in its prior action.

If a policy of fire insurance is a contract, the act of enforcing that contract as written has a clearly-recognized meaning:

> "One who asks the enforcement of a written contract without reformation does not seek replacement of any of the words written therein. Instead, *he asserts that they properly express the meaning that he had and the meaning to which the other assented.*"
>
> 3 *Corbin on Contracts* 54, §540. [Emphasis added.]

Thus, when respondent sued to enforce the policies as written and with full knowledge of all material facts, respondent represented to the Nevada court that the written policies represented the contract which respondent had and to which it had assented.

The present action proceeds on directly contrary factual assertions. The opinion states these assertions as follows:

> "• • • [T]he policies were represented to be 'valued' policies which would pay the full face amount ($290,000) in case of total destruction, whereas they actually provided for paying only the actual cash value of the property at the time of loss."
>
> Appendix A, p ii.

> "• • • [T]he loss was complete before the alleged fraud was discovered."
>
> Appendix A, p ix.

If respondent in fact relied on the misrepresentations alleged, it could not possibly have agreed to the written provisions which it previously sued to enforce. Its present allegations are that it consented only to a "valued" policy without appraisal requirements, that it did not even know the contents of the policies as written and *could not* have assented to them. Thus, there is a fundamental *factual* inconsistency between respondent's prior position and the position on which it now seeks to predicate *additional* recovery.

B. The same factual inconsistency which would bar respondent from maintaining the present action for reformation must with equal force bar a "fraud" action based on identical facts and bearing only a different legal label.

The opinion concedes that *a suit to reform the policies would be barred,* but ignores the basis of the rule stated, even though such basis is clearly stated in cases which the opinion cites:

> "The general rule is that a party cannot assume successive positions in the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory."
>
> *Royal Ins Co v Stewart* (1921) 190 Ind 444, 129 NE 853, 857; Cited by the Court in Appendix A, at p iv.

Thus the rule that an action on a written contract bars a later action for reformation of the same contract is simply a particular application of the general principle against permitting litigants to assume inconsistent factual positions in successive actions.

While the opinion recognizes that a present reformation action would be barred, it has also been conceded by everyone concerned that *respondent's present fraud allegations would originally have supported a suit for reformation of the policies.*[1] Under Nevada law, the legal basis for such reformation is stated to be:

> "* * * [C]ourts of equity have the power to order the reformation of * * * instruments, when, through mistake of the parties thereto, or through the fraud of one of the parties, or unconscionable conduct amounting to fraud, such instrument *does not contain the real terms of the contract between them.*" *Wainwright v Dunseath* (1923) 46 Nev 361, 211 P 1104, 1106. [Emphasis added.]

Since the facts on which the present fraud action is based would also establish that the policies did "not contain the real terms of the contract", it follows that these facts must be inconsistent with the assertion implicit in originally enforcing the policies as written, namely that they represented the actual agreement between respondent and petitioners.

The above conclusion is supported by the fact that in every case[2] relied on by the Court of Appeals to derive the "rule" that a suit on a contract is not inconsistent with a later action for fraud in inducing the contract, the facts of the case were such that *reformation would not have been available to the defrauded party at any*

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[1]Appendix A, p iv; BRIEF FOR APPELLANT in the Court of Appeals, p 9; BRIEF FOR APPELLEES in the Court of Appeals, pp 22, 25.

[2]These cases are cited at footnote 1 of p vi of Appendix A.

stage of the proceedings. This is because the true rule is that one may affirm a fraudulently induced contract and later sue for the fraud only in cases where the fraud is *collateral* to the contract, where the facts on which the fraud claim is based do not negate the very terms of the contract affirmed. Thus the New York Court of Appeals early noted that affirmance of a fraudulently induced contract by a defrauded party "does not thereby release or waive his claim for damages arising from a fraud *collateral to the agreement.*" (*Whitney v Allaire* (1848) 1 Comstock (NY) 305, 312. Quoted with approval in *Williamson v Clapper* (1948) 88 CalApp2 645, 199 P2 337, 342-343. Emphasis added.)

The conclusion of the Court of Appeals that a present reformation action would be barred is thus seen to be correct. This is not, however, because a reformation action would bear a "contract" label, but rather because of the fundamental factual inconsistency between enforcing a contract as written, on the one hand (as was done in the first suit), and claiming that the contract enforced was not the contract agreed to, on the other (as is being attempted in the instant suit).

This factual inconsistency must with equal force bar a fraud action based on identical facts and bearing only a different legal label. To hold otherwise would not only work inestimable injury to the finality of judgments on written contracts in general, but would particularly injure the conduct of the business of fire insurance.

Over 20 million fire policies are written annually in the United States, of which over 1 million are written in

the State of California alone.[3] The opinion has a potential effect on each and every one of these policies. Under the holding an insurer who pays a judgment on a fire policy does so *at its peril,* subject always to the now newly-proclaimed right of the insured to bring a later action claiming that the policy which he enforced was not the policy to which he agreed.

The enormous scope and impact of the decision as precedent in future cases and the injustice which it works in the present case indicate the need for review by the Supreme Court.

Respectfully submitted,

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(Appendices A, B and C Follow.)

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[3]Source: Inter-Regional Insurance Conference Study, 1960. (The policies in suit were written in California, though covering on Nevada property.)